Supreme Court, U.S.
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No. 92-1628

In The

Supreme Court of the United States

October Term, 1992

McDERMOTT INTERNATIONAL, INC.,

Petitioner,

vs.

UNDERWRITERS AT LLOYDS SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES AND RULE 28.1 LIST

The List of Parties and Rule 28.1 List published at pages ii-v of the Petition for Writ of Certiorari are reiterated herein as if copied *in extenso*.

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioner, McDermott International, Inc. respectfully submits this, its Reply to Respondents' Brief in Opposition and prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on 6 January 1993.

OPINIONS BELOW

The opinions below are as submitted in the Petition for Writ of Certiorari herein, supplemented by the Court of Appeals for the Fifth Circuit's order denying panel rehearing and McDermott's request for rehearing en

banc, reprinted in Respondents' Brief in Opposition at SA-1-3.

JURISDICTION

Respondents do not dispute this Honorable Court's jurisdiction to review the erroneous decision of the court below.

REPLY TO RESPONDENTS' ARGUMENT

The essence of Respondents' opposition lies in their reliance upon 9 U.S.C. § 16(b)'s rule that an appeal does not lie from an interlocutory order compelling arbitration. Due process is not so easily dispensed with nor is its violation below so easily obscured from this Honorable Court.

Particularly, 9 U.S.C. § 16(b) did not, as Respondents would have it, repeal the Constitution's Seventh Amendment guarantee of McDermott's right to a jury trial or the same right statutorily guaranteed by the enabling provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* and specifically § 4 of the Federal Arbitration Act. The § 16(b) preclusion of appellate review, like Respondents' opposition, presumes that the order is truly interlocutory and that it was entered upon due process. The record and opinions below demonstrate that neither presumption is correct in this case, as Respondents' attempts to side-step the questions presented herein belie.

A. THE DISTRICT COURT'S COMPULSION OF ARBITRATION IS FINAL ON THE ISSUE OF WHETHER AN AGREEMENT TO ARBITRATE WAS MADE; THEREFORE IT IS SUBJECT TO APPELLATE REVIEW.

An order staying judicial proceedings pending arbitration, or an order compelling arbitration is appealable, so long as the order in question is "final" in the context of

9 U.S.C. § 16(a)(3). This provision of the Federal Arbitration Act preserves due process and " . . . does not solely favor the arbitration process, because appeals may still be taken from final judgments concerning arbitration . . . . "[1] In *Arnold v. Arnold Corp.*,[2] the court held:

> [T]he amended Act thus retains prior law allowing appeals from final decisions affecting arbitration whether or not they direct or refuse to direct arbitration.[3]
>
> It is uncontested that in enacting the FAA, Congress intended that an "[a]ppeal c[ould] be taken from final judgments, including . . . a final judgment that refuses to enjoin arbitration." 134 Cong.Rec.S. 16,284, 16,309 (daily ed. Oct. 14, 1988) (statement of Senator Heflin in section-by-section analysis of the Judicial Improvements and Access to Justice Act of 1988, Pub.L. No. 100-702, 102 Stat. 4670-71, submitted in lieu of a Committee Report). Although some commentators have lamented that Congress has chosen this path despite the general policy favoring arbitration, *see, e.g.*, Siegel, 126 F.R.D. at 591, the Judiciary Committee itself noted that allowing such orders to be appealed "preserve[s] the general policy that appeal should be available where there is nothing left to be done in the district court." 134 Cong.Rec.S. 16,284, 16,309.[4]

The instant matter was removed from state court, pursuant to 9 U.S.C. § 201 *et seq.*, solely for the federal court to decide whether or not to compel arbitration and

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[1] *Turboff v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518, 1520 (5th Cir. 1989).

[2] 920 F.2d 1269 (6th Cir. 1990).

[3] *Id.* at p. 1275. See also, *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991).

[4] *Matter of Chung and President Enters. Corp.*, 943 F.2d 225, 228 (2d Cir. 1991).

stay the state court actions. The court summarily adjudicated the parties' declaratory judgment action, despite the ambiguity held to exist by the Fifth Circuit[5], ordered arbitration and stayed the state court actions.[6]

The only issue before the district court was the question of whether the parties were bound to arbitrate Underwriters' refusal to pay McDermott's claim, despite the "forum selection/service of suit" clause's clear, particular application to such *failure to pay claims*. It was, therefore, an "independent proceeding" and "[b]ecause in such circumstances the district court's arbitrability decision 'ends the litigation on the merits and leaves nothing for the court to do but execute on the judgment' [citations omitted], it is a final decision."[7]

The district court's order was final under 9 U.S.C. § 16, though it did not – indeed, could not – conclude all aspects of the pending litigation, because *it was conclusive within its particular judicial context*:

> [T]he impact [of § 16(a)(3)] seems to be that any determination "with respect to an arbitration" is appealable, including, as long as it is a

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[5] "Underwriters and McDermott executed an ambiguous contract. . . . " *McDermott Int'l, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1209 (5th Cir. 1991); Appendix p. A-51. "We recognize two alternate readings of the Policy's service-of-suit and arbitration clauses." Id. at 1204, Appendix p. A-39; " . . . 'failure to pay a claim' provision could be interpreted . . . " Id. at 1205, A-40; "It is just as likely that the parties did not provide . . . " Id. at 1205, A-41; "Thus, the policy *may* read . . . " Id. at 1205; "Underwriters thus possibly understood . . . " Id. at 1205, A-41; "The existence of these possible policy interpretations . . . " Id. at 1206, A-42; "The existence of alternate possible meanings . . . " Id. at 1207, A-45.

[6] See Minute Entry of February 14, 1992. Petition Appendix, pp. A-25-26.

[7] *Matter of Chung and President Ent.*, 943 F.2d 225, 228 (2d Cir. 1991).

> "final" determination *in its own judicial setting*, a mere determination that the dispute is subject to arbitration.[8]

The Honorable Edith H. Jones, Judge of the Court of Appeals for the Fifth Circuit, addressed the standard of appellate review in cases such as the one *sub judice* and opined:

> Still appealable are final orders, such as those entered in a lawsuit whose sole object is to compel arbitration, or those to obtain an injunction against arbitration. . . . Section 15 does not specifically refer to the availability of the collateral-order doctrine or mandamus, but there is no reason to believe that these limited approaches have been proscribed.[9]

The district court's Minute Entry of February 14, 1992[10] was a final, appealable order, which the Court of Appeals should have reviewed and reversed.

An order compelling arbitration presupposes a judgment, founded upon due process, that an enforceable agreement to arbitrate the dispute at hand was made. With respect to that issue and the declaratory judgment action by which it was raised in the present case, nothing remains for the district court, until this Honorable Court directs that this improper grant of summary judgment, in the face of significant genuine disputed facts, be reversed by the Court of Appeals and remanded for trial by jury.

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[8] Siegel, *Appeals from Arbitrability Determinations Under the New § 15 of the U.S. Arbitration Act*, 126 F.R.D. 589, 591 (1989), emphasis supplied.

[9] Edith H. Jones, *Appeals of Arbitration Orders – Coming out of the Serbonian Bog*, 31 S. Tex. L. Rev. 361 (1990).

[10] Petition Appendix, pp. A-10-26.

B. THE DISTRICT COURT'S DENIAL OF MCDERMOTT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO TRIAL BY JURY ON THE AMBIGUITY ACKNOWLEDGED BY THE COURT OF APPEALS REQUIRES CORRECTION BY MANDAMUS.

Respondents attempt to extend the Fifth Circuit's imposition of an "express waiver" standard, which only resolved whether Respondents had waived rights of removal under the "forum selection/service of suit" clause in the policy, to turn on its head the Fifth Circuit's clear finding of an ambiguity *it could not summarily resolve* in the conflict between the "forum selection clause" and the "arbitration clause." Respondents attempt to obscure the true nature of the proceedings below by simply not mentioning the "forum selection/service of suit clause" at all in their opposition. However, the question of removal involved *only* the parties' choices of forum for trial of the arbitrability question under the "service of suit clause," not the conflicting "arbitration clause."

The Fifth Circuit did not "reverse and render," mandating that the District Court compel arbitration, but merely held that Respondents could invoke removal jurisdiction and remanded the case for consideration and resolution of the ambiguous policy terms in federal court. The Fifth Circuit's discussion of the myriad possible readings that could be derived from the conflicting "forum selection/service of suit" and "arbitration" clauses of the policy, without extrinsic evidence, clearly demonstrated that the ambiguity had to be resolved through further evidentiary proceedings below – thus, the matter was remanded without more.[11] Thence forward, the Fifth Circuit's finding of ambiguity in the policy's conflicting

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[11] Respondents cannily but incorrectly cite one alternative reading as if it were the Fifth Circuit's holding, rather than part of its explication of the ambiguity which required remand. See Note 5, supra; Petition Appendix, pp. A-38-43. Moreover

"forum selection/service of suit" and "arbitration" clauses was, and remains, the law of the case.[12] Respondents cannot dispense with the law of the case by merely excising all mention of the "service of suit clause" from their argument. Presented with this ambiguity as the law of the case, the district court was duty-bound to take evidence and permit trial of the matter. It is "black letter" law that "[s]hould an ambiguity exist, the intent of the parties is a question of fact to be decided by the jury. *Freeman v. Continental Gin Company*, 381 F.2d 459 (5th Cir. 1967)."[13] McDermott produced substantial extrinsic evidence in the district court, establishing a factual dispute as to whether the "arbitration clause" was to be viewed as a mutual mistake, or as alternative to, subordinate to, or as priming the "forum selection/service of suit clause," under the facts of this case. Summary resolution was improper (as the Court of Appeals held by its remand after a searching but vain effort to discern the policy's meaning as a matter of law[14]) and trial on these disputed factual issues was required.

Respondents' survey of jurisprudence is flawed. *The Travelers Ins. Co. v. Keeling*, 1993 W.L. 18909 (S.D.N.Y. 1993) (91 CIV. 7753 (JFK)) (" . . . Underwriters would submit to the jurisdiction of any court of competent jurisdiction chosen by Travelers in any lawsuit, whether it be to determine the arbitrable nature of the dispute, to confirm an arbitration award, . . . or to resolve on the merits a claim not subject to arbitration.")

[12] *Christianson v. Colt Ind. Operating Corp.*, 486 U.S. 800, 815-16, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (" 'The doctrine of law of the case is . . . a heavy deterrent to vacillation on arguable issues. . . . ' 1B Moore's P. 0.404[1], at 124.") *Id.* at 819.

[13] *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 471 (5th Cir. 1981).

[14] *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1150 (5th Cir. 1993) ("If an issue was decided on appeal – either expressly or by necessary implication – the determination will be binding on remand. . . . ")

The District Court did not permit McDermott or Underwriters the opportunity to resolve their dispute over the ambiguous insurance contract between them through due and proper proceedings mandated by the Seventh Amendment to the United States Constitution and 9 U.S.C. § 4 (implementing the Convention). The result has been uncertainty, delay and justice denied. Respondents' *ex post facto* arguments in support of a result below, that, through "hit or miss," happened to be in their favor this time, do not address the clear violation of McDermott's constitutional and statutory rights to jury trial suffered herein.

C. RESPONDENTS' GRASPING FOR ALTERNATIVE STRAWS TO SUPPORT THE ERRONEOUS JUDGMENT BELOW FALLS SHORT, FOR SUCH FACTUAL ISSUES WERE NEVER REACHED BY THE DISTRICT OR APPEALS COURTS.

Respondents note that the district court held the Convention preempted the insurance regulatory law of Louisiana, despite the McCarran-Ferguson Act. The Petition herein, pages 19-26, explains why this conclusion is wrong; but more important in the present context is the irrefutable fact that the district court never reached a "choice of law" analysis and, in violation of McDermott's due process rights, never inquired into any factual issue beyond the presence of a printed arbitration clause in a document, despite a law of the case determination of ambiguity. Respondents' self-serving allegations about who wrote the policy, where it was delivered, and their attempts to read the "service of suit clause" out entirely find no support in the record below. These are merely attempts to distract this Honorable Court from the crucial questions presented by McDermott's Petition herein. They may be proper grist for the district court on remand, subject to the guidance of this Honorable Court,

but such factual issues are not ripe for review on the present Petition for Writ of Certiorari.

CONCLUSION

McDermott's right to a jury trial has not been merely delayed, it has been forever denied. The Court of Appeals could and should have corrected this error by appeal or by mandamus.

> "There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial."

Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957 (1959) (dissent). The Fifth Circuit established as the law of the case that there is a factual dispute surrounding the presence and meaning of the conflicting arbitration and "service of suit" clauses in the policy.

Moreover, the absence of undisputed evidence of the parties' intent to resolve their disputes *exclusively* by arbitration is fatal to the finding of an enforceable agreement to arbitrate.

> "An agreement to arbitrate must be clear and direct and must not depend upon implication, inveiglement, or subtlety. . . . It should not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet."[15]

Where there is a directly conflicting alternative to arbitration, provided by the "forum selection/service of suit clause" of the policy herein, the matter cannot be summarily referred to arbitration.

Congress preserved the right to jury determination of factual issues concerning the *making* of an arbitration agreement. The courts below cannot selectively repeal, *inter alia*, 9 U.S.C. §§ 16(a)(3) and 4 or the Seventh Amendment. Where courts undertake to do so, denying a

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[15] Domke Comm. Arbitration § 5:01 (Rev Ed).

party its right to jury trial and appellate review, this Honorable Court's review is sorely needed. Favoritism for arbitration cannot dispense with due process. This Court should reverse the Fifth Circuit's decision, and require the district court to empanel a jury as demanded by McDermott, as guaranteed by the Constitution, and as afforded by 9 U.S.C. § 4.

Wherefore, petitioner prays that this Honorable Court issue a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit herein, thereby to mandate that the district court apply, rather than repeal the Constitution and laws of the United States, including the Seventh Amendment, 9 U.S.C. § 4 and the McCarran-Ferguson Act in this case, and for all other relief to which petitioner may be entitled in the premises.

Respectfully submitted,

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